

In the matter of the Royal Commission into the Robodebt Scheme

No NTG-006

STATEMENT

Name	Louise Macleod
Address	One Canberra Avenue, Canberra ACT
Occupation	Public Servant
Date	22 February 2023

Introduction

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission in the RoboDebt Scheme (**Royal Commission**).
2. This statement is true and correct to the best of my knowledge and belief.
3. I provide this statement in response to the Notice to Give a Statement and Produce Documents dated 15 February 2023 and number NTG-006 (**Notice**).
4. The current Commonwealth Ombudsman, Iain Anderson, delegated authority to me under section 34 of the *Ombudsman Act 1976* (Cth) to disclose information to the Royal Commission to assist its inquiries. This statement is based on information contained in documents made available to me by the Commonwealth Ombudsman, and my own recollection of events relevant to the Notice.
5. This information is produced to the Royal Commission on the basis that it will be received into evidence by the Royal Commission pursuant to the Notice and on the basis that the information will be treated as evidence which is subject to section 6DD of the *Royal Commission Act 1902* (Cth).

Direct involvement limited to 2017 Report

6. I am not aware of the details of the April 2021 report that was published by the Commonwealth Ombudsman, titled *Services Australia's Income Compliance Program: A report about Services Australia's implementation of changes to the program in 2019 and 2020*. I was no longer occupying positions that were involved in the investigation which gave rise to this report, so I am unable to comment.
7. Where I am asked questions about 'Reports' my answers are confined to the report dated April 2017 by the Commonwealth Ombudsman titled '*Centrelink's Automated Debt Raising and Recovery system – A report about the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery*'.
8. I was provided access to documents relevant to the April 2019 report and investigation by the Ombudsman's Office to review on 14 February 2023.

Question 1

Set out your relevant qualifications and professional experience, including your employment history at the Office of the Commonwealth Ombudsman, and the positions held before and after your role at the Commonwealth Ombudsman.

Employment history and qualifications

9. I currently hold the position of Assistant Secretary, Policy Regulation and Legal Branch at the Office of the National Data Commissioner.
10. I worked at the Office of the Commonwealth Ombudsman (the **Office**) from 11 July 2016 to 31 July 2022. During this period, I worked in the following positions:
 - a. Director, Social Services & Indigenous Team within the Social Services Branch from 11 July 2016 to 22 January 2017
 - b. Acting Senior Assistant Ombudsman, Social Services, Indigenous & Disability Branch from 23 January 2017 to 8 June 2017
 - c. Senior Assistant Ombudsman, Complaints Management & Education Branch from 9 June 2017 to 3 March 2019
 - d. Senior Assistant Ombudsman, Program Delivery Branch from 4 March 2019 to 29 January 2021, and
 - e. Acting Deputy Ombudsman from 1 August 2021 to 31 July 2022.
11. Prior to joining the Office in July 2016, I worked at the following agencies in the following roles:
 - a. Civil Aviation Safety Authority – Section Head Aviation Medicine
 - b. Administrative Appeals Tribunal – District Registrar ACT
 - c. Australian Competition and Consumer Commission – Director Emerging Issues and Compliance Monitoring
 - d. Office of the Commonwealth Ombudsman – Senior Investigation Officer
 - e. Energy & Water Ombudsman Victoria – Conciliator
 - f. Department of Justice and Attorney General QLD – Mediator
 - g. Australian Army – Logistics Officer
12. In the 5-month period from 30 January 2021 to 31 July 2021, I was at the Department of the Prime Minister and Cabinet, as Assistant Secretary, Review of the Parliamentary Workplace.

13. I hold a Graduate Diploma in Legal Practice from the Australian National University.

Role at the Office of the Commonwealth Ombudsman

14. The structure of the Office when I joined in 2016 meant that different teams engaged on issues in different ways. Individual complaints (usually from members of the public) were received and actioned by the Operations Branch on a case-by-case basis. Investigation Officers within the Operations Branch were delegated by the Ombudsman the power to use section 8 of the *Ombudsman Act 1976* (Cth) (**Act**) to request information from departments and agencies when investigating individual complaints.
15. The effect of a section 8 notice is that the Ombudsman may obtain information from such persons, and make such inquiries, as they think fit. Departments and agencies can volunteer information to the Ombudsman in accordance with a section 8 notice. The Ombudsman also has a power under section 9 to compel the provision of information. Only the Ombudsman, Deputy Ombudsman, Senior Assistant Ombudsman and Executive Level 2 staff can use section 9 of the Act. Investigation Officers were Executive Level 1 and APS 4 – 6 level staff.
16. The Social Services, Indigenous & Disability Branch (the **Branch**), where I worked from 11 July 2016 to 8 June 2017, focused on conducting own motion investigations under section 5(1)(b) of the Act into systemic issues arising from administrative actions, and strategic engagement with Commonwealth agencies across the social services portfolio, including the Department of Human Services (**DHS**) and the Department of Social Services (**DSS**). This included the own motion investigation that culminated in the 2017 report, as I describe below from paragraph 35.
17. Investigation Officers in the Social Services Branch were also delegated the power to use section 8 of the Act to request information from departments and agencies when assessing systemic issues that arose from the insights gained from individual complaints, and our strategic engagement and research.
18. As Director, Social Services & Indigenous team, I led a team of about eight staff focused on strategic engagement with DHS and DSS. As Acting Senior Assistant Ombudsman, Social Services, Indigenous & Disability Branch, I led a team of about eighteen staff undertaking own motion investigations and engagement across the whole social services portfolio. This work included engaging in and investigating issues about delays in planning interviews by the National Disability Insurance Agency and concerns with the accessibility and use of Indigenous language interpreters by government agencies providing services in remote and regional communities.

Question 2

Provide details of your knowledge of the circumstances and processes that led to the Commonwealth Ombudsman Investigations which were the subject of the Reports.

April 2017 report

My early engagement

19. When I joined the Office in July 2016, the Branch had an established relationship with DHS and DSS. Engagement with DHS and DSS would occur formally via quarterly meetings, and informally as issues arose, including via topic specific briefings.
20. It was at the 26 May 2016 quarterly meeting, that DHS advised the Office of its planned roll out of a new Online Compliance Intervention (OCI) Platform from July 2016.^{1 2} I did not attend this meeting as it pre-dated my time at the Office.
21. The Minutes from the meeting show the Office queried the ability for customers to clarify old debts, and asked questions about current appeal rates by customers and the success of these, how the debt recovery fee was being applied, and the information and assistance that would be available to customers using the OCI platform. The Office also requested further information about debt variation versus debt write off or waiver and asked for more information to be provided as it was uncertain whether the OCI platform enabled the customer to develop awareness that it is possible the data on which a debt was based could be wrong.
22. On 8 June 2016, the Office requested further information from DHS under section 8 following that meeting, which included requesting information about the automatic application of the 10% recovery fee and internal or external legal advice about the change to the automatic application of the fee.³
23. On 8 August 2016, DHS provided the Office with its response including legal advice from DSS about the application of the 10% recovery fee in the OCI.⁴ The Legal advice from DSS stated the automatic application of the recovery fee in the OCI would still satisfy section 1228B of the *Social Security Act 1991*. Further information about this legal advice is provided at paragraphs 69–70.
24. On 26 October 2016, I attended a quarterly meeting with DHS staff along with colleagues from the Office. This meeting was my first strategic engagement with DHS.
25. To the best of my recollection, there was no briefing provided to me in preparation for this meeting, (and none was shown to me when preparing this statement). Based on my usual workplace practice at the Office, I expect that I reviewed the agenda, and possibly the meeting notes from the previous meeting,⁵ and spoke with my team to prepare in advance of the meeting. However, I have no specific recollection of doing so.
26. I have no independent recollection of this meeting. According to minutes of that meeting, DHS gave an update on its rollout of the OCI platform, including how the application of the 10% recovery fee was assessed in the OCI. The Office asked for information about 'special circumstances' for the application of the recovery fee, and that not all letters issued by the OCI drew the customers attention to the automatic application of the recovery fee if the customer did

¹ A422238

² A382761

³ A2310774

⁴ A2312253, A2312252

⁵ CTH.3023.002.0229

not respond by the due date. The Office also asked questions about the identification of vulnerable customers by the OCI, treatment of customers from non-English speaking backgrounds and the reasons customers could select when requesting a review of a decision online.⁶

27. At the same time my team was engaging with DHS about the rollout of the OCI, complaints to the Office were increasing as described under Question 3 below.

Initial section 8 notices

28. On 20 December 2016, an Investigation Officer in my team issued a section 8 notice to DHS (by email) asking for information about the use of income averaging, including whether DHS had sought legal advice about the legality of averaging income for social security overpayment calculations.⁷ I was copied into the email as the Director of the team which was usual practice.
29. As set out in the email to DHS, the section 8 notice was issued because of the media reporting and the large number of individual complaints the Office was receiving about the OCI as described above, from people who were concerned their debts may have been calculated using ATO income data averaged over the full financial year rather than using the actual amounts earned each fortnight.
30. On 22 December 2016 a further notice was issued to DHS under section 8 by an Investigation Officer in my team,⁸ asking if the OCI platform would be expanded to include non-PAYG ATO data from January 2017, consistent with previous information DHS gave the Office.
31. The Investigation Officer also asked in the section 8 notice whether the DHS debt notices were issued under section 11 of the *Data Matching Program (Assistance and Tax) Act 1990* and if there was legal advice on their use, any ministerial briefings on the OCI, consideration of the accuracy of debts generated by the program, project management, project governance and risk assessment frameworks used during implementation of the program. The notice also requested an urgent briefing from DHS in early January 2017.
32. I sent an email to my supervisor, Senior Assistant Ombudsman George Masri on 3 January 2017 updating him on the questions we had put to DHS under section 8 and flagging that we were also speaking with our contact at the Office of the Australian Information Commission about what we were doing.⁹ I recall Mr Masri was keeping the Ombudsman Colin Neave and Deputy Ombudsman Richard Glenn updated with what we were seeing – the increasing complaints and the media about the OCI and discussions with DHS.¹⁰ I recall being told the Ombudsman agreed an own motion investigation was necessary.
33. As a follow-on to the section 8 notice issued on 22 December 2016 and under instruction from my supervisor, on 4 January 2017 I sent an email to my equivalent at DHS setting out the issues the Office requested DHS cover at the briefing – the governance, design and functionality of the OCI platform, how DHS was ensuring the income data was accurate and the decision to raise a debt was legally valid and complied with administrative law, how DHS was assessing and

⁶ A522090

⁷ A442174

⁸ A442173, A442175

⁹ A1909740

¹⁰ A1909692, A1909674

managing the risk of incorrect decisions to raise a debt and commence collection action, especially where the customer was vulnerable, accessibility aspects of the platform, and how complaints, feedback and review requests were being dealt with by DHS.¹¹

34. On 6 January 2017, DHS provided the requested briefing which included a walk-through of the OCI platform.¹² At the briefing DHS told the Office that the methodology for raising debts had not changed, DHS was not making assumptions about the existence of an overpayment, the process was to identify an overpayment via data matching, averaging income data was not new and DHS used averaged income data where they were unable to ascertain fortnightly information from the employer or customer.

2017 own motion investigation proposal

35. In parallel to these inquiries with DHS, on 5 January 2017 I was tasked by my supervisor with preparing a minute¹³ and project initiation plan¹⁴ for the Ombudsman, Colin Neave, to consider. I sought his formal approval to conduct an own motion investigation into the OCI. This was consistent with the Office Work Practices Manual and Project Management Framework Policy.¹⁵ The decision to commence an own motion investigation under section 5(1)(b) of the Act can only be made by the Ombudsman. The decision to prepare a report under section 15 of the Act can also only be made by the Ombudsman.
36. The minute recommended an own motion investigation be commenced and identified that the key concerns of the Office were as follows:
- a) whether the OCI program met relevant legislative requirements
 - b) the accuracy of the debts raised using the OCI platform
 - c) the adequacy of the risks assessments and decision making during the planning and implementation stages of the OCI platform
 - d) the safeguards for vulnerable customers
 - e) the level of automated decision-making in the OCI platform
 - f) the impacts on decision-making quality and best practice principles, and
 - g) service delivery issues.
37. The minute recommended that a report be prepared under section 15 of the Act.
38. Mr Neave approved the conduct of an own motion on 10 January 2017, writing to the Secretary of DHS, Kathryn Campbell, the Secretary DSS, Finn Pratt, and the relevant Ministers, the Hon

¹¹ A440740

¹² A440920

¹³ A440773

¹⁴ A440547

¹⁵ A1590691, A1591801

Alan Tudge and the Hon Christian Porter under section 8 of the Act, advising he had decided to conduct an own motion investigation into the OCI program.¹⁶

39. To give context to the decision to conduct the investigation, the threshold that warrants an own-motion investigation is when a systemic issue of public administration is identified (such as being the subject of numerous complaints affecting many people that has or could cause appreciable damage to citizens, is complex, there is broader public interest in publicising the problem) and the Office perceives there is no, or insufficient, appetite or engagement by the relevant agency/s to address the systemic issue, which could warrant comment being made under section 12(4) of the Act or a report under section 15 that is published under section 35A of the Act. Further, a deficiency in an individual case that is likely to be repeated in other cases may meet the threshold for an own-motion investigation.¹⁷

Question 3

Set out your knowledge in general terms of any complaints received by the Commonwealth Ombudsman during the Relevant Period in relation to the Robodebt scheme. In your response, provide details of your knowledge on whether there was any material change in the number of complaints received by the Commonwealth Ombudsman, and whether that had any impact on the decision to commence the Investigations.

Complaints received by the Office about the Robodebt scheme

40. From October 2016 the Office saw an increase in complaints about DHS' Centrelink program, specifically about Centrelink debts and the OCI.¹⁸
41. The complaints covered a range of issues, including:
- a) the failure to provide the initial discrepancy letter
 - b) becoming aware of an outstanding debt only after receiving a demand from a debt collection agency
 - c) differences in income being recorded in the system
 - d) inconsistent information about the amount of the debt
 - e) problems uploading payslips and documents onto the OCI, and
 - f) inconsistent advice from Centrelink staff to customers outlining the evidence it was necessary to provide to get the debt reassessed.
42. There were also complaints about customers being referred online to use the OCI by Centrelink staff and refusing face to face or phone assistance.¹⁹

¹⁶ A441950, A442011

¹⁷ A1590691

¹⁸ A452976

¹⁹ A452083

43. The Office tracked the complaints in its case management system, Resolve, by recording them under an 'issue of interest' (IOI). Resolve was used by the Operations Branch staff and my Branch staff as the case management system for all complaint handling and investigations in the Office. Operations Branch staff would attach the individual complaints they were investigating to the IOIs for staff in my Branch to analyse further and engage with DHS on the systemic issues the complaints were revealing.
44. The initial IOI about Centrelink debts was called *IOI-2012-500003 Debt Recovery including the use of mercantile agents*. In December 2016, this IOI was closed, and my team created two new IOIs (*IOI-2016-400007 Online Compliance Platform*, and *IOI-600004 Application of 10% recovery fee*). We did this because in December 2016 the number of complaints received about Centrelink debt and data matching almost tripled.^{20 21} For example in June 2016, the Office received 27 complaints about Centrelink debts and in December 2016 this increased to 112 complaints about Centrelink debts. The Office was also seeing media reports about people receiving automated debt letters from Centrelink.²²

Question 4 and 5

(4) Set out your involvement in the Investigations and how, to your knowledge, they were conducted. Include any requests made for information, and the process by which material provided by the Agency and/or the Department was reviewed, considered or assessed, in the course of the Investigations.

(5) In your answer to paragraph 4, please describe the extent to which (if at all) the process followed in the Investigations:

(a) differed from the usual process adopted by the Commonwealth Ombudsman in an investigation in respect of the level or frequency of communication with agencies or departments the subject of the Investigations

(b) differed from the usual process in the extent to which the agency or department under investigation engaged with the process, provided information, and put forward material for reference or inclusion in the report.

Standing up the 2017 investigation team and approach to the 2017 own motion investigation

45. The own-motion investigation by the Office commenced in early 2017, I led a small investigation team that was stood up on a temporary basis for the duration of the investigation, consistent with usual practice in the Office at the time to bring together subject matter specialists from across the Office to do own motion investigations.²³ The team consisted of myself, two staff members from the Social Services, Indigenous & Disability Branch and one staff member from the Operations Branch, drawing on skills, knowledge and experience relevant to the investigation.

²⁰ A452976

²¹ A452083

²² A56247

²³ A1590691

46. The team reported directly to the Acting Commonwealth Ombudsman, Richard Glenn for the duration of the investigation. This was because Mr Neave left the Office in January 2017 shortly after approving the investigation. George Masri also left the Office by the end of January 2017. Richard Glenn became the Acting Ombudsman, and I began acting in the role vacated by George Masri. I had daily meetings with Mr Glenn to update him on progress and receive direction on the approach to the investigation.
47. The conduct of the own motion investigation and the process followed was decided by the Acting Ombudsman consistent with section 8(2) of the Act – in private and in such manner as the Ombudsman (at the time) thinks fit and broadly followed the process described in the Office's Work Practice Manual.²⁴
48. Mr Glenn varied the approach from that set out in the project initiation plan approved by Mr Neave. Mr Glenn wanted to clear the draft report outline (discussed from paragraph 111), and the draft report for comment under section 8(5) of the Act (discussed from paragraph 116) before these were given to DHS and DSS, rather than clearance by me as Acting Senior Assistant Ombudsman. I understood this was because I was new to the Office, and I was still learning Office processes and procedures.
49. I had frequent meetings with Mr Glenn during this investigation, as this was my first own-motion investigation, and I wanted to ensure I was undertaking it in the manner the Acting Ombudsman wanted. Also, Mr Glenn adopted a hands-on approach to the investigation and preparation of this report for the reasons set out above. Mr Glenn gave me two documents. One of the documents outlined how to structure the report and the other included his handwritten notes on the content he wished to see included in the report.²⁵
50. On 10 January 2017, the Office issued a media release announcing the own-motion investigation.²⁶ Beyond this, however, the investigation was undertaken in private in accordance with section 8(2) of the Act. The investigation was conducted in accordance with the following process:
 - a) Firstly, the Office sought to obtain all relevant information to the investigation through examination of documents and consultation with officers of DHS and DSS.
 - b) Secondly, the Office formed preliminary views about the outcome of the investigation.
 - c) Thirdly, the Office conducted further consultation on a draft report with DHS and DSS to ensure procedural fairness; and
 - d) Finally, the Office completed and published the report.²⁷
51. As will be explained in the following paragraphs, this process was broadly consistent with the Office's Work Practice Manual.²⁸ The Office was required to complete its investigation into the OCI program by early April 2017. To complete the investigation and report in the timeframe, it

²⁴ A1590691, p113.

²⁵ A443868, A443867

²⁶ A2311830 (web URL)

²⁷ A1909817, A1909652

²⁸ A1590691

was necessary for the Office to request information, consult and prepare the report contemporaneously.

52. The own motion investigation drew on the analysis of individual complaints the Office investigated which were relevant to the scope of the own motion investigation as described below at paragraph 58. As I describe above at paragraph 40, this was informed by the complaints recorded under the IOI in Resolve, desktop research by the investigation team of the legislation and case law, articles about 'digital readiness'²⁹ and what was being described as happening in media articles and by other stakeholders.
53. The Investigation Team of the Office analysed all documents provided by DHS and DSS against the following:
 - a) *Social Security Act 1991* (Cth)
 - b) *Social Security (Administration) Act 1999* (Cth)
 - c) *Data Matching Program (Tax and Assistance) Act 1990* (Cth)
 - d) the Guide to Social Security Law - Using the Social Security Guide | Social Security Guide (dss.gov.au)
 - e) the Centrelink Operational Blueprint
 - f) the Better Practice Guide to Automated Assistance in Administrative Decision Making,³⁰ and
 - g) the 27 best practice principles in the ARC report on Automated Assistance in Administrative Decision Making.³¹
54. The Investigation Team's analysis was included in the working drafts, the draft report and the final 2017 report.
55. The investigation also drew on discussions the Office held with other oversight bodies, including the Australian National Audit Office, the Inspector General of Taxation, and the Office of the Australian Information Commissioner.³² These discussions occurred to avoid duplication between the other oversight bodies and to gather information from them that may have been relevant to the investigation.
56. The investigation also drew on a roundtable with peak community stakeholders on 18 January 2017, which included representatives from the National Welfare Rights Network, Australian Council of Social Services, ADACAS, National Aboriginal & Torres Strait Islander Legal Services, Australian Privacy Foundation, Autism Australia, Carers Australia, Canberra Community Law, Financial and Consumer Rights Council, Legal Aid NSW, Mission Australia, Legal Aid Victoria, Financial Counsellors Association NSW, People with Disability Australia and

²⁹ A1909622

³⁰ A442136, A442135, A442549, A1646069, A2263696

³¹ A1693401

³² A442155, A440398, A1909633

Youth Action.³³ Attendees at the roundtable were chosen because they were assisting their client base with debt notices they had received and helping them to navigate Centrelink and use the OCI. Several of the complaints we investigated that were used as case studies in the 2017 report were referred to the Office from the attendees at this roundtable.

57. The Office sought and received further information from DHS and DSS during January and February 2017 in accordance with the section 8 notice letters.³⁴ The investigation also involved meetings between the Office and DHS and DSS staff on site, to discuss and clarify issues identified by the investigation team and to access documents.³⁵ Discussion included, for example, how the OCI worked, what were the business rules for the design of the OCI, what was the project management and governance arrangements for the OCI platform, how customers were made aware of a possible debt, what happened if they didn't respond to the debt notice, how much information was included in the notice about the debt, what customers needed to do and what income information they needed to provide when using the OCI, how customers who were vulnerable could get assistance, did the OCI explain how the debt was calculated and that it used averaging.
58. During the investigation, the DHS did not produce all the information and documents requested by the Office under the section 8 notices, even after repeated requests.³⁶ Ultimately, Mr Glenn and the investigation team decided it was necessary to complete the investigation based on the information the Office was provided. They formed the view that there was sufficient evidence to make reasonable conclusions that could be supported by evidence. This was based on considering the information we had received, including from the individual complaint investigations, and the analysis by the investigation team. This approach was consistent with how administrative investigations were completed by the Office under the Work Practices Manual – not every issue could be explored within the timeframe.

Consultation with DHS and DSS

59. The level and frequency of communication with DHS and DSS during this own motion was necessitated by the complexity of the issues being investigated as described above, the volume of information that was provided by DHS and DSS, and the need to clarify and check the information by the investigation team.
60. At the outset of the investigation, on 18 January 2017 the Acting Ombudsman met with senior staff at DHS (Jonathan Hutson, Malisa Golightly, Karen Harfield, Mark Withnell, Marcus Markovic and Scot Britton). I prepared a briefing to support the Mr Glenn in that meeting.³⁷ The brief outlined the approach the own motion investigation would follow and the scope of the investigation which included focusing on how the government's policy was being implemented, whether the OCI complied with the relevant legislative requirements and administrative law, the accuracy of debts being raised by the OCI, the adequacy of risk assessment and decision making, the adequacy of safeguards and the impact on vulnerable customers, and the impact of automated decision making on the quality of decisions, service delivery and accessibility. The brief also noted the investigation would result in a high-level report for comment in February and a more detailed report later.

³³ A442536

³⁴ A1909786, A1909690

³⁵ fA54115, fA54967

³⁶ fA54115, A448499, A444074

³⁷ A443117

61. I was aware the Acting Ombudsman had other meetings with senior staff at DHS which I identify at paragraph 87 that I was not involved in. I am not able to comment on what was discussed at the meetings.
62. On 19 and 20 January 2017, the investigation team attended DHS and met with key staff and were shown the operation of the OCI.³⁸ The investigation team was given some of the information that was requested in the section 8 notices described between paragraphs 28–34, which we scanned and uploaded into the Office records management system.
63. This was one of several meetings the investigation team had with key staff from DHS during the investigation. There were also frequent email exchanges between the investigation team and DHS and DSS³⁹ due to the concurrent activities described above that were necessary to complete the investigation and produce a report by the beginning of April 2017.

Questions 6 and 7 and 8

(6) Provide details of:

(a) the reasons for any decisions made concerning the ambit of the Investigations, including the legal basis for those decisions. This includes the decision recorded at paragraph 1.3 of the April 2017 Report not to “comment on the policy rationale behind the OCI process”; and

(b) whether the ambit of the Investigations included consideration of whether any aspect of the Robodebt scheme was contrary to law, unreasonable, unjust, or otherwise wrong within the meaning of section 15(1)(a) of the *Ombudsman Act 1976* (Cth). If it did not, why not? If it did, what, if any, findings, including preliminary or unpublished findings, were made in respect of that aspect of the Investigations and what was the basis for those findings?

(7) In responding to paragraph 6, address any consideration of the legality of the following aspects of the Robodebt scheme:

(a) the raising of debts on the basis of Averaged income;

(b) the requirement for a response, by a recipient, to the correspondence sent by the Agency; and

(c) the imposition of penalties where a recipient did not respond to the correspondence from the Agency.

Include, in your response, any conclusions that were reached on each of these issues and upon what evidence those conclusions were based.

(8) Identify all requests made to the Agency and/or Department for any legal advices in relation to the Robodebt scheme and the responses received. Describe the process by which

³⁸ fA54084, A443869, A443870, A443871, A443872, A444575

³⁹ fA54115, A448499, A444074

those legal advices were reviewed, considered or assessed in the course of the Investigations, and what conclusions were drawn with respect to those advices.

Jurisdiction of the Ombudsman Office and consideration of section 15 of the Act

64. Section 5(1) of the Act authorises the Office to investigate administrative actions taken by Commonwealth departments and prescribed authorities. Policy set by the government of the day is outside the jurisdiction of the Office and does not fall within administrative action for investigation by the Office. The policy rationale behind the OCI process was set by the government of the day and introduced as part of a 2015-16 budget measure 'Strengthening the Integrity of Welfare Payments' and a December 2015 Mid-Year Economic Fiscal Outlook announcement.
65. The scope of the 2017 own motion investigation was decided by the Ombudsman Colin Neave, after receiving advice from George Masri and I on the issues we were seeing in complaints to the Office and is reflected in the letters to the relevant Secretaries and Ministers referenced at paragraph 38. Subsequent decisions made during the investigation about findings, including unpublished findings, were made by the Acting Ombudsman Richard Glenn.
66. The decision about what was included in the final 2017 report was made by Mr Glenn, consistent with sections 15(1)(a) and 35A(3) of the Act. Section 15 is a power exercised by the Ombudsman and is not capable of being delegated. I recall the investigation team had regard to section 15(1)(a) of the Act as we analysed the information we received from DHS and DSS.

Consideration of legality

67. Prior to my employment at the Office and the commencement of the 2017 own motion investigation, the Office, on 8 June 2016, requested information from DHS under section 8 following a briefing about the rollout of the OCI at a quarterly liaison meeting on 26 May 2016. The section 8 notice requested information about automatic application of the 10% recovery fee and internal or external legal advice about automatically applying the fee under the OCI platform.⁴⁰
68. This request for information was made because slide 5 of the PowerPoint presentation given by DHS at the meeting on 26 May 2016, indicated the recovery fee would be automatically applied if the potential debtor did not contact DHS. The records show the Office considered that this approach was the opposite of DHS' existing practice at the time, whereby the recovery fee could only be applied if DHS first contacted the person as explained in part 6.7.1.45 of the *Guide to Social Security Law* and as required by section 1228B of the Social Security (Administration) Act, including satisfying the reasonable excuse provision in section 1228B(4).⁴¹
69. The records show on 8 August 2016, DHS provided the Office with its response including legal advice dated 14 July 2016 from DSS about the application of the 10% recovery fee in the OCI.⁴² In the response, DHS and DSS advised the *Guide to Social Security Law* would be updated so

⁴⁰ A2310774

⁴¹ A421624

⁴² A2312301

the policy supported the OCI, once the OCI was implemented. DSS advised it would also update the Operational Blueprint.

70. The DSS legal advice included in the response acknowledged that 'while the approach was substantially different to the existing practice which required contact with the person and establishing whether a reasonable excuse applied before applying the recovery fee, the OCI would still satisfy section 1228B because: the absence of a reasonable excuse does not need to be established before the penalty can be imposed – if a person does not take any action after receiving the letter [from the OCI], a penalty amount can be applied; there is no issue with only providing an online contact method to a person as there is always the option for a person to contact a [Centrelink] call centre if difficulties arise; the letter should be explicit about the consequences of not responding to the letter and not providing a reasonable excuse, ie that a 10% penalty amount will be added to the debt'.
71. As described above from paragraph 40, the Office had started receiving an increasing number of complaints about the OCI and debts from October 2016. Mindful of what we were told by DHS and DSS on 8 August 2016 and 26 October 2016, on 20 December 2016 the Office requested information under section 8 from DHS about using averaged annual ATO income amounts to raise debts, and whether DHS had sought legal advice about the legality of averaging income for social security overpayment calculations.⁴³
72. A further section 8 notice was sent to DHS on 22 December 2016 asking for information about the use of notices under section 11 of the Data Matching Program (Assistance and Tax) Act 1990 (Cth), including legal advice on their use, any ministerial briefings on the OCI program, consideration given to the accuracy of debts raised by the OCI, as well as project management, project governance, and risk assessment frameworks used during implementation of the OCI.⁴⁴ The notice also requested an urgent briefing from DHS in early January 2017.
73. On 4 January 2017, I sent a follow-up email to DHS to arrange the urgent briefing from DHS and flagged the Ombudsman was considering whether to commence an own motion investigation into the OCI and debt recovery.⁴⁵ In that email, I said the Office wanted to understand how DHS was ensuring the income data was accurate and that the decision to raise a debt was legally valid and complied with administrative law.
74. On 6 January 2017, we received the briefing from DHS which included a walk-through of the OCI platform. The walk through and briefing from DHS did not answer our questions about the legality of averaging. We noted that a follow-up action would be to ask DHS for the legislative provision which it was relying on to do this in the OCI.⁴⁶
75. At the onsite meeting with DHS on 19 and 20 January 2017, the investigation team was given some of the information that was requested in the section 8 notices from December described above between paragraphs 28–34. Included in this information was internal legal advice from DHS.

⁴³ A442174

⁴⁴ A442173, A442175

⁴⁵ A440740

⁴⁶ A440920

76. When reviewing the project management material DHS provided on 19 and 20 January 2017, the investigation team were concerned there were no lawyers on the DHS project management team for the OCI which was contrary to the ARC report on *Automated Assistance in Administrative Decision Making*. It looked like legal advice was only obtained by DHS in January 2015, which was after the design of the OCI was conceived.⁴⁷ The investigation team also identified that the Risk Management Plan for the OCI build included a statement that “there is a risk of legal or policy challenges” and there was a risk if a challenge occurred “success means major realignment of measures”.⁴⁸ Lastly, the investigation team noted that the Executive Minute that went to cabinet⁴⁹ showed that DSS advised legislative change would be needed, however the Risk Assessment Potential Tool that went to cabinet as part of the Executive Minute said there was no legislation required.

DHS legal advice

77. DHS provided three legal advices to the Office.
78. The first advice we were provided was dated 14 January 2015.⁵⁰ It responded to questions about whether DHS could give the customer a legal notice that required them to engage online, provide documents online, and if DHS could automatically apply the assessment outcome if a customer failed to act by going online, or went online but failed to provide documents.
79. The 14 January 2015 advice stated that the customer could be required to engage online consistent with the requirements under the Data Matching Program (Assistant and Tax) Act 1990, however it would also need an option to respond orally so as not to negatively impact on their rights. It further stated that as the request for further documentation from the customer was not a coercive notice under social security law, there were no legal requirements as to how the notice should be sent or what information was required. However, the notice did need to allow sufficient time to respond and provide an alternative to providing the information online. The advice also stated that if after giving a customer sufficient time to respond and the customer did not provide the information, then the accuracy of the decision and the process to raise a debt may be brought into question by any review authority, especially if it was shown that there was other information available.
80. The second legal advice we were provided was dated 17 April 2015.⁵¹ It responded to a description of the proposed process – that the customer would be sent a letter outlining the information to review, which would include the matched data (such as the name of the employer, period of employment and amount of income earned), information declared by the customer, and the discrepancy. The letter would outline that if they failed to respond, DHS would update their record with the information from the matched data. By applying the matched data, the total gross income would be evenly distributed across all fortnights in the employment period. The request for advice noted that DHS already apply this approach as a last resort in current processes where it was unable to identify the employer, or unable to contact the employer/s, or where customer or employer had not complied with the request for information.

⁴⁷ A1909707

⁴⁸ A444101

⁴⁹ A444103 (marked cabinet in confidence)

⁵⁰ A444637

⁵¹ A447451

81. The 17 April 2015 advice stated the decision-making process must accord with best practice administrative decision making that provides the customer the opportunity to comment on the decision made and prior to that, provide information or their comments on the matters under consideration. The advice also stated, the decision maker may be satisfied, based upon the weight and reliability of the ATO data and the absence of contradictory information, to proceed to apply it to the customers record and raise the debt. This was a case-by-case consideration for the decision maker.
82. The third legal advice we were provided was dated 14 May 2015.⁵² The advice responded to questions of whether the following process was in accordance with best practice in administrative decision making and if it was required in any contact with the customer to detail the debt amount. The process described in the request was – information is obtained from a third party; that information is considered in the context of the customer's circumstances; as a result of the consideration of the information it is likely that the customer has been overpaid and owes a debt to the Commonwealth; the customer is contacted and advised of the information from the third party, the impact on their rate of payment, and the likelihood that a debt will be raised.
83. The 14 May 2015 advice said the process appeared to mirror the six steps of good decision making as it appeared to give the customer the opportunity to be heard. It said there was no need to specify the debt amount as the department would expose itself unnecessarily if a debt amount was provided.

Concerns with DHS legal advice

84. The investigation team considered that the 17 April 2015 legal advice provided by DHS which described the proposed process, and that income averaging may be authorised as a last resort was problematic. We developed the view that income averaging on the scale proposed under the OCI was not supported by the Social Security (Administration) Act.⁵³
85. In our view, the description we had been given by DHS of the intended automation of decision making in the OCI was not properly explained to the DHS legal team with key facts left out including the likely scale of the averaging, the extent of automation and risks to accuracy. The legal advice was predicated on the automated decision making in the OCI meeting minimum administrative decision-making requirements to ensure accuracy in every case. Using averaging in the OCI to calculate the debt when the customer could not provide their income information or where the customer did not respond to debt notices would not meet the minimum requirements.⁵⁴
86. On 30 January 2017, the investigation team provided a proposed outline of the investigation report to DHS for comment, consistent with the information the Acting Ombudsman, Richard Glenn provided to DHS at the meeting on 18 January 2017, described at paragraph 60.⁵⁵ The outline of the report was approved by Mr Glenn and covered the key differences between debt recovery and data matching prior to the OCI system and under the OCI system, including scale, automation of fundamental parts of the decision-making process and shifting the onus to

⁵² A444636

⁵³ A1646067

⁵⁴ A448329

⁵⁵ A444638

customers to provide evidence of employment and income. The outline also noted there was no specific legal advice on the process being fully automated.

87. On 20 February 2017 I provided the Acting Ombudsman with a briefing for a meeting with Jonathan Huston of DHS on 22 February 2017. The briefing set out our concerns with the legality of the OCI program based on our analysis of the DHS legal advice and attached an early draft of the report that included a section examining the legality of averaging.⁵⁶ I cannot recall whether this meeting was initiated by the Office or by Jonathan Huston. I did not attend that meeting, and to the best of my knowledge Mr Glenn was the only attendee from the Office.⁵⁷ I have not seen any records of what was discussed at that meeting.

DSS legal advice

88. On 19 February 2017 the Office requested DSS provide copies of legal advice authorising the use of income averaging, referring to information DHS had provided to the Office to the effect that it has always used averaging as a last resort.⁵⁸ DSS responded to this request on 23 February 2017, with a copy of legal advice advising that averaging could be used as a last resort and referred to section 79 of the Social Security (Administration) Act and the positive obligation on the Secretary to determine the correctness of the rate of social payment being paid to a person.⁵⁹
89. On 24 February 2017, the Office made a further request to DSS to provide a copy of legal advice about the legislative change that would be needed to use ATO data in the way proposed in the Executive Minute dated 12 February 2015, given to the Office by DHS on 19 and 20 January 2017.⁶⁰
90. In response, on 1 March 2017, DSS provided the Office with the legal advice previously provided on 23 February 2017, combined with legal advice dated 2014.⁶¹ The advice dated 2014 stated that the proposal to 'smooth' a debt amount over an annual or other defined period may not be consistent with the legislative framework, and to correctly determine a relevant debt it would be necessary to consider the amount received in each relevant fortnight. The covering email referred to this 2014 advice and stated that DSS had considered the need for legislative change to support implementation of the OCI, had obtained the advice in December 2014 and provided this to DHS, DHS had then adjusted the process and DSS no longer considered that legislative change was needed. DSS stated it was satisfied the OCI met legislative requirements.

Concerns with DSS legal advice

91. The investigation team also had concerns with the DSS legal advice that income averaging could be used in the manner proposed under the OCI, although we considered its assertion that the process was authorised under section 79 of the Social Security (Administration) Act (Cth), may be open and arguable.⁶² Section 79 requires that a retrospective rate calculation must be made if DHS is satisfied that the rate paid was more than the rate provided by social security law.

⁵⁶ A1881446, A461854

⁵⁷ A1646068

⁵⁸ A455171

⁵⁹ A458862

⁶⁰ A2309696

⁶¹ A1615600

⁶² A460089

Advisory opinion idea not pursued

92. In the 20 February 2017 briefing to Mr Glenn to support his meeting with Jonathan Hutson from DHS, I noted that I was seeking advice from the Administrative Appeals Tribunal (**Tribunal**) to find out what the Tribunal would need from the Office to obtain an advisory opinion under section 10A of the Act.⁶³ I was unfamiliar with the process of seeking an advisory opinion from the Tribunal and the Work Practices Manual did not cover the process. At the time, I understood the Office may have sought an advisory opinion from the Tribunal once before, but it was not something the Office had any real experience or expertise in.
93. In response to my contact, I recall being told by Chris Matthies at the Tribunal that the President of the Tribunal would require a fully argued hearing supported by written submissions from both sides. I recall the Acting Ombudsman did not consider this feasible within the existing resources dedicated to the investigation and that it would considerably extend the length of the investigation. I expected that testing the legality issue in this way would (quite properly) involve a substantial response from DHS and DSS based on their legal advice and on the seriousness of the consequences of an opinion suggesting that the OCI program was unlawful in one or other respects.

Legality not a feature of the final 2017 report

94. Ultimately the Acting Ombudsman decided not to include findings on legality in the 2017 report. While a section examining legality was drafted,⁶⁴ it was not included in the draft report provided to DHS and DSS for comment on 10 March 2017.⁶⁵
95. The decision on the content of a report is one that can only be taken by the Ombudsman under section 15. I cannot speak definitively to the reasons for that decision.
96. In early 2017, I and others in the investigation team had developed genuine doubts that the OCI was lawful. We had doubts that the legal advice we had seen from DHS and DSS allowed for the raising of debts based on averaging under the OCI, although we also thought the legal advice provided to the Office by DSS on 23 February 2017, stating that the OCI was authorised by section 79 of the Social Security (Administration) Act (Cth), may be open and arguable.⁶⁶ We also had concerns with the automatic application of the 10% recovery fee in the OCI, and considered this fettered the discretion and judgement needed by the decision maker when assessing whether a customer had a reasonable excuse to not apply the penalty as required by section 1228B of the Social Security Act 1991 (Cth). We noted that while DHS had the power to automate decision-making under section 6A of the Social Security (Administration) Act (Cth), it cannot do so where it would fetter a discretion.
97. My recollection is the Acting Ombudsman was reluctant to publish a report that relied on our views and that dismissed the advice and position of DHS and DSS. In an email to me on 28 March 2017, Mr Glenn told me he preferred DHS' interpretation of section 1228B of the Social Security Act (Cth).⁶⁷ There were also timing imperatives in publishing the report that

⁶³ A1881446

⁶⁴ A461854

⁶⁵ A481072, A481071

⁶⁶ A460089

⁶⁷ A1881444

would suggest that Mr Glenn did not wish to invest more time in finally resolving this difference of views.

98. Mr Glenn wanted the report published by early April 2017. There were increasing numbers of complaints being received from December 2016 and increasing media coverage of the issue in early 2017. My recollection is Mr Glenn considered it important to both ensure that DHS was being held accountable for making improvements to the administration of the program, and that the Office was seen as responsive to the growing public concern. By the end of April 2017, the Acting Ombudsman had left the Office.

Question 9

Explain what evidence was received from the Agency that supported the conclusions that:

- (a) the OCI system accurately calculated debts**
- (b) the business rules underpinning the system accurately captured the legislative requirements**
- (c) the business rules underpinning the system accurately captured the policy requirements**

99. The Office requested the ICT project management, project governance and risk assessment documentation for the OCI on 22 December 2016.⁶⁸ DHS provided this documentation at the on-site meeting on 19 and 20 January 2017⁶⁹ and talked through these with the investigation team. The project documentation included the Detailed Requirements Document for the OCI platform which set out the business rules and requirements for the design and build (**business rules**).
100. The business rules required the system to issues notices and letters to customers, detailing:
- a) their legislative obligations
 - b) what the customer needed to do (including the information the customer needed such as bank account details to complete the intervention)
 - c) the timeframe to complete the intervention with reminders and warnings
 - d) assist customers (including when using the system with help text and instructional advice), and
 - e) for those with vulnerability indicators (such as those aged over 80, no fixed address, residing in a disaster area) pushed them to the previous manual intervention process.
101. The business rules also required the system to display options to the customer that included confirming the data already in the system (by accepting or updating), disputing the data provided (because the match was incorrect in some way), or adding additional information and uploading documents about other income (such as compensation, leave payments, termination payments,

⁶⁸ A442173, A442175

⁶⁹ A444144, A444145, A444146, A444147

fringe benefits etc), including inputting specific details such as start and end dates with employers, days of week worked and amounts paid to enable accurate debt calculations.

102. The business rules also required the system to explain the debt calculations and how it was made, including the employer/s data the debt had resulted from, the period and the actual income versus the declared income for the debt period, and the ability to request more detailed information about the decision. The business rules also allowed the customer to seek reassessment of the decision at any time and to provide (and upload) new information about their income.
103. The business rules also required detailed reports to be produced from the OCI for auditing and external review purposes.
104. As examined in Appendix B of the 2017 final report, the investigation team was satisfied the business rules for the design and build of the OCI would calculate accurate debts if the information fed into it was correct from the various data sources it relied upon. These sources included the ATO data, the existing data held by DHS and information provided by the customer.
105. The business rules showed that the system did not create a new way of calculating debts. Instead, the OCI created a new way of collecting information to put into the existing debt calculator that DHS used, and new information could be fed into the calculator at any time.

Question 10

Set out your knowledge of, and involvement in, the process of drafting the Reports. In your answer, please address the following:

(a) describe the usual process of providing draft reports to agencies or departments the subject of Investigations carried out by the Ombudsman, including the opportunity to comment on the draft text of the report and any draft recommendations

(b) explain the approach taken in the Investigations whereby draft outlines of the Reports, and drafts of the Reports, were provided to the Agency or Department. Provide the justification for that approach, and explain and produce copies of any legal advice that informed that approach

(c) describe any consultation with the Agency or Department in respect of drafting the Reports, including Correspondence, Communications, meetings and discussions

Consultation on the draft reports

106. The usual practice of the Office when conducting investigations is to always provide a draft report to the agency subject to investigation in accordance with section 8(5) of the Act and as described in the Work Practices Manual.⁷⁰ In providing the draft report, the agency is invited to provide their comments on the draft report which the Office would then consider.
107. Providing a draft report is a procedural fairness requirement so any adverse findings are put to the agency, ensuring there are no surprises and giving them an opportunity to take remedial

⁷⁰ A1590691, p 22

action which can then be noted in the report. This is one of the ways the Office seeks to influence improvements and changes in public administration by agencies as the recommendations and suggestions the Office makes to agencies are not binding. The obligation under section 8(5) sits alongside the obligation in section 35A(3) that the Ombudsman must not disclose information or make statements about a particular investigation where the opinions of the Ombudsman are expressly or implied critical of a person or the agency unless section 8(5) is complied with.

108. An agency will often provide their comments by way of track changes to a draft report. However, the Office casts a critical eye over all suggestions offered by an agency in this manner. Suggested changes are often rejected or re-worked.
109. The Ombudsman recognises the agency has technical expertise in the area of government administration under investigation. As such, it welcomes comments from agencies that clarify or correct or provide further context. The Office considers whether the comments correct factual inaccuracies, and whether the evidence better supports the original wording or the suggested changes. The Office prefers to use language that is neutral, factual and impartial in the final report as described in the Work Practices Manual.⁷¹
110. The other main way in which comments are given is in a meeting to discuss the draft report. This may involve discussing specific wording, specific draft findings or recommendations, or broader themes. The Office will test and negotiate the proposed recommendations with agencies to ensure they are practical and can be fully implemented by the agency.

Outline of 2017 report

111. On 30 January 2017, a proposed outline of the investigation report was provided to DHS for comment.⁷² The outline covered the key differences between debt recovery and data matching prior to the OCI and under the OCI, including scale, automation of fundamental parts of the decision-making process and shifting the onus to customers to provide evidence of employment and income. The outline also noted there was no specific legal advice on the process being fully automated.
112. The outline was provided to DHS as part of an overall process to afford procedural fairness to them as required by section 8(5) of the Act. At the initial meeting with DHS on 18 January 2017, Mr Glenn stated that he would provide DHS with a high-level report for comment. This was that report.
113. The outline comprised a very early draft of all the issues the Office was seeing, what the Office knew at that stage about the OCI and some early analysis and concerns. Providing it to DHS gave it an early opportunity to identify any factual errors, and points of difference, and to provide further information to address the issues the investigation team was identifying. I recall my expectation was that we would receive comments and further material from sharing this outline.
114. The outline included reference to averaging and that it had been used by DHS in limited circumstances where DHS was unable to contact the employer or customer. The outline queried whether use of averaging reflected best practice decision making when used on a wide scale for

⁷¹ A1590691, pp 33, 36 and 84.

⁷² A447451

historical debts and noted that the legal advice we had seen from DHS assumed that a person was making the decision and the advice did not cover the process being fully automated.

115. On 3 February 2017, DHS provided comments on the outline including that income averaging was a long-standing process in use by DHS since the early 1980s, it was authorised under the *Guide to Social Security Law*, the OCI process was not fully automated, although automation of decision making was allowed under section 6A of the Social Security (Administration) Act 1999 (Cth).⁷³

April 2017 report

116. On 10 March 2017, the Acting Ombudsman approved, and the Office provided to DHS and DSS a draft of the final report. The draft was provided for comments as part of the procedural fairness steps required by sections 8(5) and 35A(3) of the Act.⁷⁴
117. The draft report detailed at paragraph 3.7, 3.8 and in Appendix B from paragraph 2.36 onwards that, in our view, the automatic application of the 10% recovery fee in the OCI fettered the discretion and judgement needed by the decision maker when assessing whether a customer has a reasonable excuse to not apply the penalty as required by section 1228B of the Social Security Act 1991 (Cth). We noted that while DHS has the power to automate decision making under section 6A of the Social Security (Administration) Act 1999 (Cth), it cannot do so where it would fetter a discretion.
118. I recall that numerous meetings were held between the Office and DHS concerning the draft report, including with the Acting Ombudsman.⁷⁵ I cannot recall exactly how many meetings were held and the documents I reviewed in preparing this statement do not assist my recollection as there were no minutes taken at these meetings. I recall Annette Musolino, Alison McCann, Jason McNamara and Michael Robinson attended these meetings. I recall keeping the Acting Ombudsman updated on the meetings about the draft report that he did not attend.
119. In these meetings, the DHS representatives in attendance had strong views and expressed them forcefully. The issues canvassed included administrative decision making and evidence gathering, and application of the 10% recovery fee. The doubts the team had about the lawfulness of averaging were not raised. This is because Mr Glenn had decided not to include any mention of this in the report, as discussed above at paragraph 94.
120. DHS provided the Office with track changes and comments to the draft report on 20 March 2017.⁷⁶ The DHS mark-ups changed the analysis and findings about fettering discretion in relation to the application of the 10% recovery fee at paragraph 3.7 and 3.8 but not in Appendix B.
121. The track changes by DHS were considered by the investigation team and either accepted in full, rejected in full or stylistically modified to use plain English.⁷⁷ We rejected in full the DHS track changes to paragraph 3.7 and 3.8.

⁷³ A450519

⁷⁴ A480912, A480911, A481072, A481071

⁷⁵ A481052, A529912

⁷⁶ A484084

⁷⁷ A484089

122. On 23 March 2017, I sent the next version of the draft report back to DHS following our consideration of their comments and track changes.⁷⁸ In this version of the draft report, the investigation team added a footnote to paragraph 3.8 that referenced a decision of the Federal Court - *Australian Postal Corporation v Forgie* [2003] FCAFC 223 (8 October 2003), paras 40 and 59 following research into relevant case law.⁷⁹ In that case, Black CJ, Merkel and Stone JJ found that consideration '...of the words 'without reasonable excuse' introduces a distinctive requirement for some deliberative human action. An assessment needs to be made at some point – by a person...'. And at paragraph 50, that 'in whatever way the process of arriving at a reasonable excuse is to be characterised, ordinary administrative law principles are not excluded. Thus, the process – whatever it should be called – is one that would have to be undertaken in good faith, taking into account only relevant considerations and in accordance with procedural fairness obligations, etc.'
123. On 28 March 2017, the Acting Ombudsman let me and one of the other members of the investigation team know by email that Jonathan Hutson from DHS wanted to speak with him the following day about '...a couple of outstanding issues where we have a "misunderstanding" before the report...' was finalised.⁸⁰ In that email Mr Glenn referred to our views on the 10% recovery fee and that he wanted to move away from the language of fettering discretion and adopt more of the DHS position and its interpretation of how section 1228B operates and that better communication with customers would address our concerns. Based on this direction from Mr Glenn, the published version of the 2017 report stated at paragraph 2.40 that any question of fettering discretion could only be answered by the courts.
124. DSS was also consulted on the draft report⁸¹ and provided its comments.⁸² I cannot recall if there was a meeting with DSS representatives to discuss the draft report. I do recall the Office's engagement with DSS was less involved than with DHS. DHS was the lead 'responder' to the draft report given its lead role in administering the debt recovery program and implementing the OCI.
125. On 29 and 30 March 2017, the final draft of the report was provided to DHS and DSS for formal response by the Secretaries so these could be included in the published report.⁸³ ⁸⁴The formal responses to the report were received from DHS on 5 April 2017⁸⁵ and DSS on 6 April 2017.⁸⁶ There were no further redrafts after this final consultation. The agency responses formed Appendix C to the report.

⁷⁸ zA13752

⁷⁹ A1909698

⁸⁰ A1881444

⁸¹ A484937, A485753

⁸² A491106

⁸³ A486252

⁸⁴ A491371

⁸⁵ A491780

⁸⁶ A491990

Finalisation of the 2017 report

126. On 7 April 2017, the Acting Ombudsman approved the 2017 report and its publication⁸⁷ with letters sent to the relevant Secretaries and Ministers as required by section 15 of the Act.⁸⁸

Questions 11, 12 and 13

(11) Set out your knowledge of, and involvement in, the provision of the 2017 AIAL Conference Paper to the Agency prior to that paper being delivered.

With respect to your answer:

(a) provide an explanation of the reasons why the 2017 AIAL Conference Paper was provided to the Agency prior to the paper being delivered;

(b) produce copies of any documents recording comments received from the Agency and/or the Department in relation to the 2017 AIAL Conference Paper, including file notes of meetings; and

(c) explain what changes were made to the 2017 AIAL Conference Paper and presentation following any feedback or comments received from the Agency.

(12) Set out your knowledge of, and involvement in, any contact from the Agency as proposed in the email bearing document ID number CTH.3001.0048.6854

(13) Provide a detailed description of your knowledge and view of the AIAL Hanks Paper, and any steps you took with respect to the Investigation after receiving that paper.

127. On 3 March 2017, I sent an email to the Acting Ombudsman seeking approval to pitch a paper to the AIAL Conference organisers for its 2017 conference about the lessons to be learnt when automating administrative decision making using the OCI platform as a case study.⁸⁹ The conference theme covered the impact of technology on public administration and privacy and managing data and information holdings. The investigation team and I considered this was a good opportunity to promote best practice public administration around the Government's digital transformation agenda.

128. On 8 June 2017, the conference organisers advised that our pitch had been chosen and we were requested to submit a paper and presentation.⁹⁰ A paper⁹¹ and a presentation⁹² were prepared by a member of the investigation team and these were given to the new Ombudsman, Michael Manthorpe for review and approval before submitting to the conference organisers. Michael Manthorpe had joined the Office as Ombudsman in May 2017.

⁸⁷ A492365, A485676

⁸⁸ A492404, A2292064, A492400, A2292061

⁸⁹ A477883, A477764

⁹⁰ A529348

⁹¹ A501267

⁹² A530681

129. On 14 July 2017, Mr Manthorpe sent me and members of the investigation team an email with his comments on the paper for the conference.⁹³ He checked that we did not include any new criticism of DHS beyond what we said in the 2017 report and said we should give DHS an opportunity to comment if we did. A member of the investigation team confirmed there were no new criticisms in the paper about DHS, to which the Ombudsman said he was then happy to approve the paper.
130. I was provided 2 documents - ID number CTH:3001.0048.6854 and CTH:1000.0008.3726. The document ending in 3726 shows I provided a copy of the paper that I would present at the AIAL conference to Michael Robinson from DHS on 17 July 2017, stating it was provided for information only and had been approved by the Ombudsman. I also stated in the email that we had been careful to keep the paper consistent with the own motion report and if DHS had any concerns to let me know. I do not recall any further contact with DHS about this paper.
131. I attended the AIAL Conference along with other members of the investigation team. I recall the Ombudsman attended the Conference as well as he told me afterwards that I presented the paper 'calmly and clearly'. I recall, when hearing Peter Hanks keynote speech, we felt very disappointed about the decision not to include anything in the 2017 report about our concerns with the legality of the OCI.
132. However, we (the investigation team) did note that Mr Hanks' paper and speech appeared to focus only on sections 1222A and 1223(1) of the Social Security Act 1991 (Cth), without mention of other relevant legislative provisions under the Social Security law such as sections 6A and 79 of the Social Security (Administration) Act 1999 (Cth).
133. At the time of the conference, I had moved into a different role at the Office and was no longer directly involved in the strategic engagement and own motion work, and the 2017 investigation had concluded in April.
134. I am aware that a member of the investigation team prepared a minute and a draft letter after the conference in August 2017 requesting the Ombudsman consider writing to DHS under section 12(4) of the Act raising our concerns about the legality of averaging. However, I am not aware and the records I reviewed do not show if it was given to the Ombudsman.⁹⁴ The analysis in the proposed letter was based on the draft section examining the legality of averaging that was not included in the 2017 report.

Question 14

Summarise your knowledge of the responses to the Reports and the steps taken to ensure that the recommendations were implemented.

135. I provide the following information in accordance with paragraph 14 of NTG-006. A more fulsome explanation of my involvement in relation to the implementation of the recommendations made in the 2017 report is addressed in my Statement in response to NTG-0216.

⁹³ A530814

⁹⁴ A540338, A483062

136. The 2017 report contained several recommendations which the Departments considered. I received notice of the formal response of DHS on 5 April 2017, and DSS on 6 April 2017.⁹⁵ The formal responses to the 2017 report from the Secretary of DHS and Secretary of DSS are at appendix C to the report.
137. DHS agreed to implement recommendations 1, 2, 3, 5, 6, 7, and 8 in full. DHS also agreed to implement recommendation 4a, 4b and 4c in full.
138. DSS agreed to implement recommendation 4d.
139. As I changed roles within the Office on 9 June 2017, I did not have direct responsibility for monitoring the implementation of the recommendations made in the 2017 Report. This responsibility remained with the new head of the Strategy Branch (formerly the Social Services Branch), Ms Fiona Sawyers. My involvement concerning the implementation of these recommendations was therefore limited to being copied into email correspondence with Ms Sawyers. I provide further detail on my involvement in relevant email exchanges below from paragraph 161.
140. I am aware that, on 10 August 2017, the Office created a new IOI to monitor the implementation of the recommendations from the 2017 report. The process for monitoring the implementation of the Ombudsman's recommendations is set out in the Work Practices Manual.⁹⁶

Question 15

Provide details of your knowledge and circumstances of the Deputy Ombudsman providing a media release for the Agency to provide to the Minister, as set out in document ID number CTH.1000.0011.1190.

141. In October 2018, I was working in the role of Senior Assistant Ombudsman Operations Branch. The Operations Branch was responsible for investigating individual complaints received from the public on a case-by-case basis as described at paragraph 14 above. The Office would also receive complaints from members of Parliament, NGOs, businesses and other stakeholders, including anyone who had dealings with government agencies and contracted services providers.
142. On 30 May 2018, the Hon Andrew Wilkie MP wrote to the Ombudsman asking him to investigate debt notices being sent by Centrelink as part of the Social Welfare Debt Recovery Program. Attached to the letter was a redacted debt notice received by one of Mr Wilkie's constituents, Mr Dut.⁹⁷
143. When Michael Manthorpe became Ombudsman in May 2017, he directed that he be notified of all correspondence, including complaints from members of parliament, other office bearers of importance and contacts from the media. The letter from Mr Wilke was received by the Intake team in my branch.

⁹⁵ A491780, A491990

⁹⁶ A1590691, pp 110, 117, and 121.

⁹⁷ A1630805

144. On 12 June 2018, the Ombudsman sent a response back to Mr Wilkie advising he would investigate the issues raised and requested further information about the debt notice Mr Wilkie had attached to his letter.⁹⁸ The Ombudsman directed that I work closely with the Investigation Officer from the Strategy Branch on the investigation into the debt notice Mr Dut had received. The investigation into the broader issues raised by Mr Wilkie were handled by the Strategy Branch.⁹⁹
145. Consistent with that direction, Ms Sawyers and I corresponded with Mr Wilkie and his office during the investigation. We provided regular updates, including notifying Mr Wilkie of the outcome of investigation into Mr Dut's debt notice on 19 October 2018.¹⁰⁰
146. The finalised investigation into Mr Dut's debt notice was approved by the Ombudsman after he was briefed by me and Ms Sawyers on 4 September, and only after we had dealt with further issues to the satisfaction of the Ombudsman.¹⁰¹
147. Consistent with the media direction of the Ombudsman discussed below, the briefing minute considered that the letters to Mr Wilkie and Mr Dut may be published in the media. As a courtesy, it was appropriate to provide DHS with a copy of the letters to Mr Wilkie and Mr Dut, so that DHS would be forewarned if that did occur. We were aware that Mr Wilkie had been regularly commenting in the media about DHS and the Robodebt Scheme.¹⁰² A copy of the letters was sent to DHS by the Investigation Officer on 19 October 2018,¹⁰³ followed by an email advising closure of the complaint on 28 November 2018.¹⁰⁴
148. On 24 October 2018, I received the email and a phone call from Michael Robinson at DHS.¹⁰⁵ I cannot remember what was discussed in the phone call and no longer have records of this conversation. I sent the email onto the Ombudsman and Deputy Ombudsman Jaala Hinchcliffe with a suggested response.¹⁰⁶ The Ombudsman wanted a more fulsome response which I drafted, and which was amended by the Deputy Ombudsman, before being approved by the Ombudsman to send to DHS.
149. On 25 October 2018 I received an email from Michael Robinson at DHS (and the Deputy Ombudsman was also copied in) forwarding an internal DHS email from Craig Storen advising that the Ombudsman approved words I had sent the day prior were included in the DHS question time brief for that day.¹⁰⁷

Question 16

⁹⁸ A2310834

⁹⁹ A1909810

¹⁰⁰ A1662752, A1665814, A1667725, A1673257, A1684654, A1688567

¹⁰¹ A1669051

¹⁰² A1909797

¹⁰³ A2296857

¹⁰⁴ A1909759

¹⁰⁵ CTH.1000.0011.1190

¹⁰⁶ A1686623

¹⁰⁷ A2312045

Provide your view as to whether the provision of a media release to the Agency differed from the usual process adopted by the Commonwealth Ombudsman with respect to providing media releases to agencies, departments or Ministers.

150. The Office Work Practice Manual detailed what staff were to do if they received a media enquiry.¹⁰⁸ The Manual stated that the Ombudsman or Deputy Ombudsman would decide whether to respond to media enquiries. Consistent with this, on 9 January 2017 I sent an email to DHS advising that the Deputy Ombudsman Richard Glenn was giving an interview to the Guardian about the own motion investigation.¹⁰⁹ Other media enquiries received during the investigation were also dealt with this way.¹¹⁰
151. When Michael Manthorpe joined the Office as Ombudsman in May 2017, he also directed that he wanted to be notified of all media enquiries received by the Office, and he or the Deputy Ombudsman would approve all responses to the media. He also made it clear that he wanted to engage with the media to educate them about the role of the Office and the work we did, while noting the requirements on confidentiality in section 8(2) and section 35 of the Act.
152. This extended to correcting the record and clarifying when there were media articles about the Office and its work that were inaccurate, along with notifying agencies and departments the office was investigating about media enquiries we received and had responded to, so they were forewarned. This was on a case-by-case basis subject to the approval from him or the Deputy Ombudsman.

Question 17

Describe your views as to:

a) whether there were any deficiencies in the process followed in the Investigations or in the April 2017 Report. If so, what was the cause of those deficiencies, and what changes could be made to avoid those deficiencies arising in future investigations;

b) the extent to which the Commonwealth Ombudsman provided an accountability mechanism for government conduct in relation to the Robodebt scheme, and the effectiveness of that accountability mechanism following each of the Reports.

153. While the Office's Work Practices Manual provides broad guidance for conducting an own motion investigation, each Ombudsman investigation is different depending upon the issues to be investigated, where information comes from, the agency being investigated and the views of the Ombudsman of the day. There is no standard way or process for conducting an own motion investigation, including no standard timeframe.
154. In this case we balanced increasing concerns about the OCI with influencing timely and positive improvements to its operating. The Ombudsman's recommendations that arise from its

¹⁰⁸ A1590691, p 60.

¹⁰⁹ A1909669

¹¹⁰ A1909770

- investigations are not binding on agencies. The Office seeks to make practical and achievable recommendations to inform improvement in the way agencies administer government policy.
155. Our investigation concentrated on improving the OCI system's usability, its transparency, accessibility, fairness and the adequacy of support for users of the system, including the quality of service delivery by DHS and procedural fairness for customers.
156. DHS agreed to and implemented changes that we suggested to the OCI during the investigation. This included the following:
- a) No longer applying the 10% recovery fee automatically for customers who responded to the initial letters.
 - b) Enhancing the OCI system to make it easier for customers who had a reasonable excuse to notify DHS so they would not be charged the fee.
 - c) Providing clearer information and a further invitation to provide a reasonable excuse in debt notification letters.
 - d) Taking additional steps to ensure customers were aware of the income discrepancy by sending them the initial contact letter and the first reminder letter by registered mail and sending a further reminder letter and attempting phone contact with the customer.
 - e) Working with the Digital Transformation Agency to conduct comprehensive user testing of enhancements to the OCI system to make it more user-friendly.
157. We detailed the further improvements DHS made to the OCI in February 2017 based on feedback we gave them during our investigation in Appendix A of the 2017 report, at paragraphs 1.30 to 1.50.
158. The investigation flagged the issue of the legality, despite it not being included in the 2017 report.
159. Within the timeframe required and given the scope and nature of the investigation I believe the investigation was undertaken thoroughly and effectively.

Question 18

Describe whether, and if so how, the Commonwealth Ombudsman monitors either references made to its reports, or reliance placed on its reports, by agencies which have been the subject of an investigation, and any action taken in response to that monitoring.

160. While Michael Manthorpe was Ombudsman, the Communications team would conduct media monitoring and provide daily briefings to the Executive, specifically the Ombudsman, Deputy Ombudsman and Senior Assistant Ombudsman. This media monitoring would capture references to the Office, the Ombudsman, other key staff and certain topics in which the Office was interested across government.
161. On 9 April 2018, I was included in an internal email exchange between Fiona Sawyers and relevant team members investigating the implementation of the recommendations made in the

2017 report.¹¹¹ Ms Sawyers discussed a meeting that she and I had with the Ombudsman concerning DHS' response to a media enquiry from Paul Karp from the Guardian, which construed the 2017 report as confirming that the online compliance system meets all legislative requirements. As a result of this meeting, Ms Sawyers' email suggests that the Ombudsman sought follow up work to gain clarity on this broader issue of legality, including with respect to our work on the 2017 report. Ms Sawyers also queried with her team whether she should suggest to the Ombudsman that he write to DHS to correct the record concerning DHS' response to Mr Karp's enquiry. I am unable to comment on whether this further correspondence took place as I have no recollection beyond my involvement described in this paragraph.

162. On 24 May 2018, I was copied into correspondence between the Deputy Ombudsman, Jaala Hinchcliffe, and Annette Musolino.¹¹² The email canvassed several issues, among which Ms Hinchcliffe sought correct an inaccurate media statement on 5 April 2018. Ms Hinchcliffe took issue with a DHS employee quoting that "[t]he independent review by the Commonwealth Ombudsman found the online compliance system met all legislative requirements".
163. The records show Annette Musolino responded to the Deputy Ombudsman on 8 June 2018 advising that DHS had updated the media lines to ensure they met the wording used in the 2017 report.

Signature of witness:

L Macleod

Name of witness:

Louise Macleod

Date

22 February 2023

¹¹¹ A1909736

¹¹² A1909602